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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 74-742

FOREMOST-MCKESSON, INC.,
Petitioner,

v.

PROVIDENT SECURITIES COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR GULF & WESTERN INDUSTRIES, INC. AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE RESPONDENT

WHITNEY NORTH SEYMOUR
One Battery Park Plaza
New York, New York 10004
Counsel for Gulf & Western Industries, Inc.

Of Counsel:

JOHN A. GUZZETTA
BERNHARDT K. WRUBLE
CONRAD K. HARPER
LINDSAY A. LOVEJOY, JR.
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Gulf & Western Industries, Inc. (hereinafter "Gulf & Western") respectfully submits this Supplemental Brief pursuant to Rule 41 of the Court to call attention to recent authorities and matters intervening since the time that its brief in chief was filed. The filing of this brief is dependent upon the resolution of Gulf & Western's motion, dated June 20, 1975, for leave to appear as amicus curiae.

1.

On September 29, 1975 the United States Court of Appeals for the Seventh Circuit rendered its decision in

Allis-Chalmers Manufacturing Co. v. *Gulf & Western Industries, Inc.*, F.2d (Nos. 74-1266 and 74-1267), in which it aligned itself with the decision of the Court of Appeals for the Ninth Circuit in the instant case, holding that the purchase by which an outsider with no prior relationship to the issuer acquires more than 10% of a class of the issuer's securities does not trigger Section 16(b)'s automatic liability.

The court, finding that "There is no possibility under the facts of this case that Gulf & Western could have made 'unfair use of information . . . obtained . . . by reason of [its] relationship to [Allis-Chalmers]'" in making its initial purchase (Slip Op. at 5-6), framed the issue as follows:

> "The precise question is therefore whether section 16(b) applies to a purchase/sale short-swing transaction where the decision to initiate the transaction (i.e., purchase the stock) could not have been premised on use of information obtained through a section 16 (a) insider relationship with the issuing company." (Slip Op. at 6)

It concluded, "the statute was never intended to reach such a transaction." *Id.*

The Seventh Circuit, while agreeing with the Ninth Circuit, extended its insight into the legislative history and concluded that there was no "necessity . . . to attribute to Congress an intent to utilize a chameleonic definition of the simple phrase 'at the time of'" (Slip Op. at 15). It emphasized that the purchase/sale or sale/purchase combination at which Congress aimed was essentially a "conceptual unit" which, under the logic of the statute, must be preceded by a relationship on which presumed access to information can be based. Drafts of the legislation indicated that,

> "The critical point for measuring insider status (*i.e.*, beneficial ownership) was *prior* to the opening purchase of stock." (Slip Op. at 16) (Italics original)

Thus,

> "Given the fact that the section was aimed at preventing speculation based on abuse of inside information, the section must have contemplated a *pre-existing* beneficial interest: unless the opening purchase was motivated by an insider's anticipation of an upward market, the full purchase/sale transaction could hardly be characterized as 'speculative' from the standpoint of insider abuse. *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. at 597." (*Id.*) (Italics original)

Returning to the legislative history, the court stated:

> "[R]etention of specific language obviating the need for independent proof of the insider's intention 'in entering into such transaction' would indicate that Congress still meant to focus on insider status 'prior to' the unitary transaction in question and not 'simultaneous with' the initial step in that transaction, as suggested in *Stella* and later cases." (Slip Op. at 17)

This analysis results in a relatively simple and highly logical test:

> "The question is whether one in a position of presumed access to inside information, . . . combined a purchase and a sale of his company's stock, in any order, within a period of six months, thereby producing a profit. . . . The logic of this test is clear: the position of director, officer, or beneficial owner results in a presumption of access to inside information, and the short-term nature of the transaction results in a presumption that this information motivated a coordinated short-term turn-over." (*Id.*)

It therefore concluded,

> "Since Gulf & Western did not occupy any section 16(b) insider position prior to the initial purchase of 3,000,000 shares of Allis-Chalmers common stock, its subsequent sale of this stock within six months did not trigger that section's conclusive presumption that a coordinated short-swing transaction based on inside information had taken place." (Slip Op. at 19)

2.

Following the text at page 9 of our main brief which states,

> "Virtually all recent critical commentators strongly reject the idea that the initial more-than-10% transaction by an outsider should be subject to § 16(b) as both indefensible logically and inconsistent with the legislative purpose,"

we would add the additional citations:

> Note, *Ten Percent Stock Ownership—Prerequisite to Section 16(b) Short-Swing Liability*, 16 B.C. IND. & COM. L. REV. 838 (1975); and
>
> Note, *Section 16(b)—Initial Purchase of Ten Percent of a Class of Equity Securities is Not a Section 16(b) Purchase*, 43 FORDHAM L. REV. 678 (1975).

Conclusion

We respectfully submit that the rule adopted by the Courts of Appeals for both the Seventh and Ninth Circuits is correct and should be sustained.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
One Battery Park Plaza
New York, New York 10004
Counsel for Gulf & Western Industries, Inc.

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